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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JIMMY SWAGGART MINISTRIES,

Appellant,

—v.—

BOARD OF EQUALIZATION OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan, membership organization dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. Throughout its 70 year history, the ACLU has appeared before this Court in numerous cases involving the Religion Clauses of the First Amendment. Within the past year alone, the ACLU participated, either as direct counsel or as amicus curiae, in Allegheny County v. ACLU of Pittsburgh, ___ U.S. ___, 57 U.S.L.W. 5045 (July 3, 1989); Frazee v. Department of Employment Security, 489 U.S. ___, 109 S.Ct. 1514 (1989), and Texas Monthly v. Bullock, 489 U.S. ___,

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1/ Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 36.2.

109 S.Ct. 890 (1989). This case raises similar issues about the proper relationship between church and state.

STATEMENT OF FACTS

Appellant, Jimmy Swaggart Ministries, seeks an exemption from California's Sales and Use Tax Law, Cal. Rev. & Tax Code §§6001 et seq., as applied to its retail sales of religious books, records and tapes made in the state of California, or sent by mail to California residents. California taxes all sales of tangible property, without exception. Jimmy Swaggart Ministries is a nonprofit religious corporation. Under protest, appellant paid $183,338.09 in taxes assessed against it by the Board of Equalization of the State of California for the years 1974 through 1981. Following an unsuccessful petition to the Board, appel-

lant brought this lawsuit seeking a refund of the amount paid.

The trial court upheld the assessment after a hearing. The California Court of Appeal affirmed, rejecting appellant's constitutional arguments. 204 Cal.App.3d 151 (1988), as modified, 204 Cal.App.3d 1269 (1988). The Supreme Court of California denied appellant's petition for review, ___ Cal.3d ___ (1988), and this Court noted probable jurisdiction. 109 S.Ct. 1741 (1989).

SUMMARY OF ARGUMENT

Jimmy Swaggart Ministries ("Swaggart Ministries" or "Swaggart") asks this Court to create an unprecedented and unwarranted religious exemption from California's neutral, nondiscriminatory sales tax on the transfer of tangible property, such as tapes, books and record albums. Neither

the free exercise clause nor the establishment clause supports Swaggart's claim.

Specifically, none of the free exercise decisions of this Court, including Murdock v. Pennsylvania, 319 U.S. 105 (1943), support the theory advanced by Swaggart. There simply is no precedent suggesting that a neutral tax on income received in the sale of tangible goods, a tax which is imposed on all sales in California (whether or not made by charitable or religious organizations), is anything other than a valid means of revenue raising by the state. To the contrary, this Court's decisions make clear that the free exercise clause does not exempt religious individuals or organizations from such nondiscriminatory taxes. Hernandez v. Commissioner of Internal Revenue, 109 S.Ct. 2136 (1989). Even in cases where the pay-

ment of a tax is contrary to religious belief, the strong interest of the state in a uniform system of nondiscriminatory taxes has been found to outweigh the resulting burden on religion. United States v. Lee, 455 U.S. 252 (1982).

Moreover, establishment clause concerns dictate that such an exemption would be unconstitutional. Fashioning an exemption for sales made by religious organizations, while all other sales of tangible goods in California are taxed, including those sold by nonreligious charitable and educational organizations, would create an exclusive class of tax beneficiaries based solely on religion. Texas Monthly v. Bullock, 109 S.Ct. 890 (1989). Appellant thus asks this Court to create by judicial fiat an exemption parallel to the one enacted by the Texas legislature and found

violative of the establishment clause in Texas Monthly.

In sum, because the free exercise clause does not support Swaggart's claims, and because establishment clause jurisprudence undermines Swaggart's claims, the decision of the California appellate court should be affirmed.

ARGUMENT

I. THE FREE EXERCISE CLAUSE DOES NOT MANDATE A RELIGIOUS EXEMPTION FROM A NEUTRAL, NONDISCRIMINATORY TAX ON SALES OF TANGIBLE PROPERTY

Swaggart Ministries bases virtually its entire argument on Murdock v. Pennsylvania, 319 U.S. 105 (1943), a case involving a flat license tax on all travelling salespeople. Murdock, however, does not provide the support that appellant is seeking.

In Murdock, Jehovah's Witnesses, who proselytize by travelling door-to-door, talking about their faith and selling religious tracts for a nominal fee or giving them outright to willing listeners, claimed that the license tax burdened their right to exercise their belief. This Court agreed, and held that the tax was unconstitutional.

Contrary to the argument made by Swaggart, the Court did not hold that a tax imposed on income, as opposed to a flat license tax levied on an itinerant evangelist, is a violation of the free exercise clause. In fact, the Court emphasized the difference between a tax imposed on property or income, such as the sales tax at issue here, and the license tax imposed on all door-to-door solicitors at issue in Murdock:

> We have here something quite different . . . from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

319 U.S. at 112. Further, unlike the California sales tax, the license tax in Murdock was "in no way apportioned" to the "realized revenues" of the itinerant preachers forced to pay the tax. Id. at 113-14.

Clearly then, under Murdock, a flat tax levied on an activity which constitutes the exercise of religious belief is unconstitutional. But that is a far cry from holding that a general sales tax applied to realized revenues from the sale of religious literature is unconstitutional. Indeed, last Term, the Court twice considered and rejected free exercise claims

that closely parallel the position of Swaggart Ministries in this case.

In Texas Monthly v. Bullock, 109 S.Ct. 890 (1989), a nonreligious publication brought an establishment clause challenge to a Texas statute that exempted religious periodicals from the state's general sales tax. In defense of its statute, Texas argued, much as appellant has argued here, that failure to provide an exemption would violate the free exercise rights of those who published religious periodicals. This theory was rejected in the plurality opinion written by Justice Brennan. Of particular relevance here, Justice Brennan explained that a tax on income is distinguishable from the occupation tax involved in Murdock:

> The sales tax that Texas imposes is not an occupation tax levied on religious missionaries. Nor is it a flat tax that "restrains in advance," 319

> U.S. at 114, the free exercise of religion. On the contrary, because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications, and in view of its generality it can hardly be viewed as a covert attempt to curtail religious activity.

109 S.Ct. at 904.[2/]

Although finding the question closer than Justice Brennan, the dissent in Texas Monthly also acknowledged that Murdock is "narrowly distinguishable," 109 S.Ct. at 914, from a situation involving sales taxes

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2/ Justice Blackmun's concurrence in Texas Monthly, joined by Justice O'Connor, did not decide the free exercise issue, but did state that the free exercise clause "suggests" that it may not be constitutional to tax the sale of religious books. 109 S.Ct. at 906. However, Justice Blackmun concluded that even if the free exercise clause mandates an exemption for religious publications, the establishment clause dictates that the exemption may not be limited to religious books, but must also be extended to materials devoted to "matters of conscience" in general. Id. Appellant, of course, is seeking precisely the sort of exemption that would be unconstitutional in Justice Blackmun's view.

on religious publications -- precisely the context in which Swaggart Ministries now seeks an exemption by relying invalidly on Murdock as virtually its sole support.

For a variety of reasons, therefore, this case is closer to Texas Monthly than to Murdock. Like the general sales tax involved in Texas Monthly and unlike the license fee involved in Murdock, California's sales tax is not a flat tax; it represents only a small fraction of any sale; it is payable by the buyer, rather than by the religious organization; and it applies to all sales of tangible property made in California. If religious periodicals in Texas do not have a free exercise right to an exemption from the state sales tax, it is difficult to conceive why Swaggart Ministries would have the right to such an exemption on the facts of this case.

Appellant's free exercise claim is also incompatible with this Court's decision last Term in Hernandez v. Commission of Internal Revenue, 109 S.Ct. 2136 (1989). The issue in Hernandez was whether fixed payments made to the Church of Scientology for so-called "training" and "auditing" sessions could be deducted as charitable contributions under the Internal Revenue Code. In ruling that a deduction was unavailable, the Court stressed that the payments at issue "were part of a quintessential quid pro quo exchange: in return for their money, petitioners received an identifiable benefit . . . ." 109 S.Ct. at 2145. The Court also rejected the claim that collecting a neutral tax from Scientology adherents under these circumstances burdens religion in violation of the free exercise clause:

> Any burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent.

Id. at 2149.

Similarly, there is no evidence in the record that collection and payment of the California sales tax challenged by appellant is prohibited by the religious beliefs of the Swaggart Ministries, or that it would inhibit its religious activities in any direct or meaningful way. Rather, the absence of an exemption merely requires Swaggart Ministries to collect the tax from its California purchasers and turn over the money to the state.

Indeed, appellant's free exercise claim would be difficult to sustain even if

the record established a cognizable religious burden, which it does not. As the Court stated in United States v. Lee, 455 U.S. 252, 260 (1982), "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." See also Texas Monthly, 109 S.Ct. at 902 (state interest in collection of sales taxes equals federal interest in collection of social security taxes).

Applying that principle in Lee itself, this Court held that the federal government's interest in uniform collection of social security taxes outweighed the burden placed on Old Order Amish taxpayers, whose religion forbids "both payment and receipt of social security benefits." 455 U.S. at 257.

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

Moreover, "a State's interest in the uniform collection of a sales tax appears comparable to the Federal Government's interest in the uniform collection of Social Security taxes, and mandatory exemptions under the Free Exercise Clause are arguably as difficult to prove." Texas Monthly, 109 S.Ct. at 902.

In short, this Court's recent decisions under the free exercise clause effectively determine the outcome here. As in Hernandez, Lee and Texas Monthly, California's interest in the uniform collection of taxes is high. As in Texas Monthly and Hernandez, appellant does not oppose the

payment of taxes as a matter of religious belief, but rather because of a possible reduction in income due to the marginally increased prices of their products and because of the costs associated with administering the tax.[3/] Unlike Lee, this case involves no direct burden on religious exercise or belief. And, unlike Murdock, California's sales tax does not infringe the right to pursue a given faith by imposing a fee on evangelistic activity.

3/ Collecting and remitting the tax, contrary to Swaggart's arguments, does not constitute the kind of intrusive and inhibiting government oversight that rises to the level of an infringement of religion. See e.g., Hernandez, 109 S.Ct. at 2149; Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)(compliance with administrative requirements of minimum wage and hour laws does not create burden on religious exercise). Nor would compliance with the tax laws create an impermissible entanglement between government and religion, in violation of the establishment clause. See Point IIB, infra.

The free exercise clause, therefore, provides no justification for the exemption claimed by Swaggart Ministries. As Justice Marshall emphasized in Hernandez, the position urged by Swaggart "knows no limitation," and would undermine the integrity of the tax system. 109 S.Ct. at 2149.

II. THE ESTABLISHMENT CLAUSE PROHIBITS A JUDICIALLY-IMPOSED EXEMPTION FOR RELIGIOUS PUBLICATIONS

Not only does the free exercise clause provide no support for the claims made by Swaggart Ministries, but the establishment clause forbids the creation of such a narrow exception to the tax laws.

A. A Tax Benefit Conferred Exclusively Upon Sales Of Religious Publications Violates Establishment Clause Principles

In Texas Monthly, this Court held that a statutory exemption from the Texas state sales tax for religious periodicals violates the establishment clause. Because both the purpose and the primary effect of the exemption was the advancement of religion, the statute violated the first two prongs of the three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), and conveyed a "message of endorsement" of religion. 109 S.Ct. at 896 & n.1, quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

Justice Brennan's plurality opinion in Texas Monthly emphasized that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious

"donors."'" 109 S.Ct. at 899, quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983). See also Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983). When this vicarious support is conferred only upon religion, an unconstitutional endorsement of religion is created in violation of the establishment clause.

Justice Blackmun's concurrence in Texas Monthly, joined by Justice O'Connor, also stressed the fact that the exclusivity of the benefit conferred upon religion under the Texas exemption violated establishment clause principles:

> [B]y confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, see Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic

> understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.

109 S.Ct. at 907 (citations omitted).[4/]

The narrowness of the benefited class distinguished Texas Monthly from earlier cases, such as Walz v. Tax Commission, 397 U.S. 664 (1970). In Walz, this Court upheld New York State's property tax exemption scheme for religious and other nonprofit, educational and charitable organizations. Because the tax benefit was extended to a variety of groups, in addition to religious organizations, the exemption did not violate the establishment clause. 397 U.S. at 673. See also Mueller v. Allen, 463 U.S. 388 (1983)(tuition tax

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4/ See also Allegheny County v. Greater Pittsburgh ACLU, 57 U.S.L.W. 5045 (July 3, 1989). Citing Texas Monthly, the Court stressed that the establishment clause "prohibits the government's support and promotion of religious communications by religious organizations." 57 U.S.L.W. at 5052.

credit that was available to parents who send their children to nonreligious as well as to parochial schools upheld against establishment clause challenge). By contrast, a tax benefit conferred exclusively upon religion violates basic establishment clause values. Yet, that is precisely the sort of exclusive benefit appellant seeks in this case.5/

Recognizing the problematic nature of any claim to exclusive benefits, appellant attempts to argue that the establishment clause entitles Swaggart Ministries to equal treatment at the hands of the state,

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5/ Nor can the exemption proposed by appellant be justified as an "accommodation" of religion. As the Court stated in Allegheny County, an accommodation is valid only when it removes a governmentally imposed burden on religious exercise. 57 U.S.L.W at 5052 n.51. A tax exemption, because it operates as a subsidy of Swaggart's proselytization, would constitute the "kind of government affiliation with particular religious messages that the Establishment Clause precludes." Id.

and that it seeks nothing more. That abstract proposition, however, has little relevance to this case. Indeed, Swaggart's contention that California's neutral tax scheme has a disproportionate impact on certain religions is virtually identical to the argument rejected by this Court in Hernandez:

> It may be that a consequence of [denying the exemption] . . . is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fund-raising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions."

109 S.Ct. at 2147 (citations omitted).[6/]

6/ Both Hernandez and this case are easily distinguishable from this Court's decision in Larson v. Valente, 456 U.S. 228 (1982). In Larson, the Minnesota state legislature enacted a law specifically addressed to religious groups,

(continued...)

California's sales tax satisfies the test proposed by the dissent in Hernandez as well. Justice O'Connor, joined by Justice Scalia, argued that the IRS could not constitutionally tax some fixed payments made to religious organizations for religious services while declaring other, similar payments to be deductible:

> [T]he Government has only two practicable options with regard to distinctively religious [benefits for

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6/ (...continued)
targeting especially those groups that solicit funds in public places. Indeed, there was evidence in the record that the legislation was directed at the "Moonies." 456 U.S. at 254-55. Thus, the Minnesota statute involved the "selective legislative imposition of burdens and advantages upon particular denominations," without secular justification. Id. at 254 (emphasis in original).

In its brief, appellant predicts that California will selectively impose the sales tax only on unpopular denominations, and/or on out-of-state groups. Brief for Appellant at 40. If that were the situation here, this would be a far different case. However, nothing in the opinions below suggests that there is any question of selective prosecution of state laws at issue.

> which a fixed sum is demanded by religious organizations]: to disregard them all, or to tax them all.

109 S.Ct. at 2153 (O'Connor, J., dissenting). Here, California has apparently chosen the path of taxing the sale of all tangible property. That decision lies well within its constitutional authority.

B. Denial Of An Exemption From Sales Taxes Will Not Entangle The State In Religious Affairs

Swaggart Ministries also argues that denial of an exemption will violate the establishment clause by entangling the state in religious affairs. This argument too must fail.

As this Court held in Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-06 (1985), the sort of routine governmental oversight and enforcement necessary to administer fair labor standards or, as in this case, sales taxes, does

not create the pervasive and intrusive involvement that rises to the level of a constitutional violation. As this Court held in Hernandez, the application of neutral tax laws to religious groups does not entangle government impermissibly in religion. 109 S.Ct. at 2147-48.

The mere fact that collecting and remitting the tax will entail some costs for Swaggart Ministries does not enmesh government in religious affairs. The sorts of entangling activities that have been found to violate the establishment clause are far more invasive than the level of contact created by the administration of neutral tax laws. Cf. Aguilar v. Felton, 473 U.S. 402, 414 (1985)(continual and detailed monitoring and contact between state and religious schools violates nonentanglement principle); Larkin v. Grendel's

Den, Inc., 459 U.S. 116 (1982)(delegation of governmental authority to religious body entangles government in religious affairs).

Swaggart also claims that the need to determine what portion of the price paid for religious items was intended to be a donation will impermissibly entangle government in internal religious affairs. This argument, however, was soundly rejected in Hernandez. Thus, even if Swaggart Ministries can demonstrate that some portion of the payments made for religious publications was in fact a donation rather than part of the sale of tangible property, the determination of exactly how much is deductible does not in itself violate the nonentanglement principle.

> [T]he need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems by forcing the government to place a monetary value on a religious

> benefit. In cases where the economic value of a good or service is elusive . . . [the IRS] has often employed . . . an inquiry into the cost (if any) to the donee of providing the good or service . . . . This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involves administrative inquiries that, as a general matter, "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

Hernandez, 109 S.Ct. at 2148 (citations omitted). Neither of Swaggart Ministries' arguments about the allegedly entangling aspects of the sales tax, therefore, has any merit.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal should be affirmed.

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